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IN THE

Supreme Court of the United States

October Term, 1959.

No. 225

ORDNANCE GAUGE COMPANY,

Petitioner,

vs.

JACQUARD KNITTING MACHINE CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

and

APPENDIX

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1959.

No.

ORDNANCE GAUGE COMPANY,
Petitioner,

vs.

JACQUARD KNITTING MACHINE CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on February 18, 1959;—in respect which judgment a timely petition of rehearing was denied (with opinion) on April 9, 1959.

OPINIONS BELOW.

The Opinion of the District Court (App. p. 26a) is reported at 21 F. R. D. 575.

The Opinion announced by the Court of Appeals on February 18, 1959 (App. p. 31a) is reported at 265 F. 2d 189.

The Opinion announced by the Court of Appeals on April 9, 1959 (App. p. 41a), on petition for rehearing, is reported at 265 F. 2d 195.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was made and entered on February 18, 1959 (App. p. 40a). A timely petition for rehearing was filed on March 20, 1959,* and was denied (with opinion) on April 9, 1959 (App. pp. 41a-43a).

On July 8, 1959 an Order was entered in this Court, under its Rule 22(4), extending to July 18, 1959 the time for filing a petition for writ of certiorari.

Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

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* the time for filing the petition for rehearing was extended to March 20, 1959, by orders of the Court dated March 6 and 14, 1959.

QUESTIONS INVOLVED.

The questions stated below involved primarily the *due process* provision of the Fifth Amendment of the Constitution that

> "No person shall . . . be deprived of . . . property without due process of law"

and the provisions of Rule 41-b of the Federal Rules of Civil Procedure that

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Question 1.

1) Is Rule 41-b applicable to dismiss a complaint without a trial on a thoery of the "failure of the plaintiff to prosecute" in an action which had *never* been listed, set or called for trial and wherein there had *never* been any

> "failure of the plaintiff . . . to comply with these rules or any order of court"

within the purview of Rule 41-b *nor any other* "failure of the plaintiff" preventing or hindering the bringing of the case to trial or defendant's preparation for trial;—where the alleged "failure of the plaintiff to prosecute" forming the *sole* basis of defendant's motion and the Court's dismissal under Rule 41-b consisted only of plaintiff's failure sooner to request the Clerk to list the action on the trial-calendar after the case was at issue* or merely the time-

* though plaintiff's Praecipe, requesting the Clerk to list the action on the trial-calendar, was filed 4 months **before** defendant filed its motion to dismiss under Rule 41-b.

interval between plaintiff's Praecipe requesting the listing of the case on the trial-calendar and the last previous step or proceedings taken in the case by either party or by the Court?

Question 2.

2-A) Is not such dismissal a deprivation of plaintiff's property without due process of law, in violation of the Fifth Amendment of the Constitution?

or, conversely,

2-B) If the phrase "failure of the plaintiff to prosecute" in Rule 41-b is construed as intended to authorize such dismissal, then is not Rule 41-b unconstitutional as lacking the *due process of law* required by the Fifth Amendment because of its indefiniteness in failing to provide any standard or criteria *of the length of the time-interval,*

between plaintiff's Praecipe to list the case on the trial-calendar and the last previous step or proceedings taken in the case by either party or by the Court,

upon the passage or expiration of which the complaint may be dismissed on defendant's motion?

RULES AND CONSTITUTIONAL PROVISION INVOLVED.

The *due process* clause of the Fifth Amendment of the Constitution of the United States:

> No person shall . . . be deprived of . . . property without due process of law. . . .

Rules and Constitutional Provision Involved

Federal Rules of Civil Procedure:

Chapter VI Trials

Rule 41 Dismissal of Actions

b) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

District Court's local 2-Year Rule promulgated by its general Order of November 24, 1952:

In every civil action, not answered "Ready for Trial" upon a preliminary call, in which no proceedings has been taken for a period of two consecutive years, the Clerk shall, immediately upon the expiration of such two year period, send notice to counsel of record, or if none, to the parties that, unless the Court upon application made within two weeks after such notice shall otherwise order, the case will be deemed to be abandoned and stand dismissed, and, in the absence of such application to or order by the Court the Clerk shall without special order enter upon the record "Dismissed under the rule" and tax the costs against the plaintiff. Dismissal under this rule shall be without prejudice.

STATEMENT OF THE CASE.

Basis of federal jurisdiction of the court of first instance.

As to the First Cause of Action pleaded in the Complaint, for Violations of the Anti-Trust Laws of the United States (App. pp. 3a-9a), federal jurisdiction of the court of first instance is based on the anti-trust laws of the United States, and more particularly Sections 1, 2, 13, 14 and 15 of Title 15 of the United States Code (App. p. 9a).

As to the Second Cause of Action pleaded in the Complaint, for Unfair Competition, federal jurisdiction of the court of first instance is based on diversity of citizenship and the amount in controversy (App. pp. 2a-3a) under 28 U. S. C. 1332 (App. p. 10a) and is also (independently) based on 15 U. S. C. 1126-h and -i (App. p. 10a).

As to the Third Cause of Action pleaded in the Complaint, for Trade Slander and Libel, federal jurisdiction of the court of first instance is based on diversity of citizenship and the amount in controversy (App. pp. 2a-3a) and 28 U. S. C. 1332 (App. p. 10a) and is also (independently) based on 15 U. S. C. 1126 (App. p. 10a).

Chronologic Outline of Proceedings in this Action.

The Complaint was filed on May 3, 1951 (App. pp. 2a-11a).

The Answer was filed on June 29, 1951 (App. pp. 11a-16a).

Though at issue on June 29, 1951, and triable at all times thereafter, the action was *never* listed, set or called for trial at any time, either upon any "preliminary call" within the purview of the District Court's local 2-Year Rule (page 5, supra) or upon any other trial-call.

Statement of the Case: Outline of Proceedings

On November 8, 1956, the Clerk mailed to the attorneys of each of the parties his customary form-letter (App. p. 16a), as notice under the District Court's local 2-Year Rule, which notice the Court of Appeals later (on February 18, 1959) held to be invalid and of no effect because it was not sent until more than 3 years after the time when the 2-Year Rule required the Clerk to send it (App. pp. 37a and 38a).*

On November 21, 1956, petitioner filed a Praecipe (App. p. 17a), requesting the Clerk to list the case for trial on the calendar of trials by jury, and on the same day the Clerk prepared and entered in his records the customary calendar-card (App. p. 44a) for this action;—assigning to it Calendar Number 6295. This the Clerk did in accordance with the long-established and unvarying practice obtaining in the Clerk's Office (up to that time) not to dismiss an action under the local 2-Year Rule if either party files a Praecipe requesting the case be listed for trial.

Petitioner followed up its aforementioned Praecipe by the filing (on November 23, 1956) of an application that this action shall not be deemed abandoned and shall not be dismissed for lack of prosecution (App. p. 17a) under the District Court's local 2-Year Rule;—even though under the long-established practice referred to above the Praecipe alone was in and of itself a sufficient response to the Clerk's notice under the local 2-Year Rule.

On March 15, 1957, approximately four (4) months after the filing of the foregoing Praecipe and the preparation and entry (by the Clerk) of the aforementioned calendar-card, but before the Clerk had placed the case on the next trial-calendar, respondent filed its motion to dismiss for failure to prosecute under Rule 41-b (App. pp. 18a-19a).

On August 19, 1957, the District Court entered an Order (App. p. 22a) granting respondent's aforementioned motion

* In the lower Court petitioner had also contended that the District Court's 2-Year Rule was inapplicable because the case had never been on a "preliminary call" within the purview of that Rule.

to dismiss under Rule 41-b and entered a Judgment (App. p. 22a) dismissing the Complaint.

On August 29, 1957, petitioner filed its Petition for Rehearing (on respondent's motion to dismiss) and its Motion to Vacate the aforementioned Judgment of dismissal;—petitioner's Petition for Rehearing and its Motion to Vacate containing a verified statement of facts (App. pp. 23a-25a).

On January 21, 1958, the District Court handed down its Opinion (App. pp. 26a-28a) and Order (App. p. 29a) vacating its former Judgment of dismissal under Rule 41-b (App. p. 22a) and dismissing the action without prejudice under the District Court's local 2-Year Rule.

Upon petitioner's Appeal (App. p. 29a) from that part of the District Court's Order of January 21, 1958 (App. p. 29a) which dismissed the action without prejudice under its local 2-Year Rule, the Court of Appeals (App. p. 31a):

a) held that the District Court's dismissal of the action (App. pp. 28a and 29a) under its *applicable* local 2-Year Rule could *not* be sustained because the Clerk's letter of notice (App. p. 16a) which the Rule required him to send "immediately" after the expiration of the 2-year period, was delayed more than three (3) years beyond the end of such 2-year period, but

b) affirmed the District Court's dismissal of the action by invoking Rule 41-b and by sustaining respondent's belated* motion to dismiss "for failure to prosecute" under Rule 41-b;—which motion the District Court had first granted by its Order and Judgment of August 19, 1957 (App. p. 22a) and subsequently denied by its Opinion (App. pp. 26a-28a) and Order of January 21, 1958 (App. p. 29a) on rehearing.

On April 9, 1959, the Court of Appeals denied petitioner's Petition for Rehearing;—with a *per curiam* Opinion (App. p. 41a).

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* belated because respondent's motion to dismiss "for failure of the plaintiff to prosecute" under Rule 41-b was filed 4 months **after** petitioner (plaintiff) had filed its Praecipe requesting the Clerk to list the case on the trial-calendar.

Dismissal below is in reality with prejudice even though in form it is "without prejudice".

The lower Courts' dismissal of the complaint in the action at bar is "without prejudice" *in form only.** In reality, such dismissals were necessarily with prejudice, in view of the operation of the statute of limitations.†

Hence, the mere fact that the dismissal below was in form denominated as one "without prejudice", does not in any way affect the questions involved on the present Petition for Writ of Certiorari.

Moreover, if (as petitioner submits) Rule 41-b is inapplicable to dismiss the complaint without a trial in an action which had never been listed, set or called for trial and in which there had never been any "failure of the plaintiff . . . to comply with these rules or any order of court", then it is inapplicable irrespective of whether such dismissal under Rule 41-b is, *in form*, with or without prejudice.

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* the District Court's Opinion and Order dismissing the complaint "without prejudice" under the local 2-Year Rule are at Appendix pages 28a and 29a.

the Court of Appeals' dismissal of the complaint under Rule 41-b "without prejudice", is at Appendix pages 38a-40a.

† When petitioner filed its complaint at bar, there was no federal statute of limitations applicable to suits under the federal anti-trust laws, and the applicable statute of limitations of the state in which the District Court was sitting, governed: **Gordon vs. Loew's, Inc.**, 247 F. 2d 451, at 454 (3 Cir. 7-31-57).

The Statute of Limitations in Pennsylvania provides for a 6-year limitation in tort actions which would comprehend violations of the federal anti-trust laws: 12 Purdon's Pennsylvania Statutes Annotated 31 (1713, March 27, 1 Sm. L. 76, Section 1).

Since petitioner filed its complaint at bar, a federal statute of limitations has been enacted, specifically imposing a 4-year limitation upon suits in federal anti-trust cases. 15 U.S.C. 15b (Act of July 7, 1955, 69 Statute 283, Section 4B).

Facts bearing on petitioner's failure to request a trial-listing prior to November 21, 1956 (when it filed its Praecipe, requesting the Clerk to list case on the next jury-trial calendar).

The parties had been engaged in protracted and costly prior litigation with each other, which was Civil Action 10,850 in the United States District Court for the Eastern District of Pennsylvania, wherein the respondent was the plaintiff and wherein the petitioner was the defendant.

The Complaint in that earlier litigation (C. A. 10,850) was filed on April 19, 1950, and after many motions and hearings on motions incident to the production of documents, etc., the taking of depositions, plaintiff's motion to postpone trial, and pretrial hearing, the trial was commenced on July 19, 1951 and was concluded on April 16, 1952, after six trial-sessions (totaling 14½ trial days);—there having been hearings on various motions and further depositions having been taken during the recesses in the trial.

The District Court handed down its Opinion on September 8, 1952 (108 F. Supp. 59);—upon which Opinion a Judgment was entered on November 14, 1952.

That prior litigation was decided by the Court on Appeals for the Third Circuit on May 19, 1954 (213 F. 2d 503), and the time for filing a Petition for Writ of Certiorari expired on August 19, 1954.

As shown by the verified statement contained in plaintiff's Petition and Motion in the District Court (App. pp. 23a-25a), the extensive and intensive earlier litigation (from April 19, 1950 to the middle of 1954) was an inordinate drain upon the resources of the petitioner and upon the time and attention of its executive and key personnel;—petitioner being a small manufacturer, while respondent is a large concern and a subsidiary of one of the largest textile companies in the world.

The extent and intensity of the earlier litigation between

the parties is reflected in part by the 847 printed pages of Appendices* filed in Court of Appeals for the Third Circuit in that earlier case (213 F. 2d 503) and the 123 docket-entries and the forty-four (44) volumes of Transcripts of hearings, arguments, depositions, and trial sessions in that earlier case.

The drain on petitioner's resources, coupled with the serious illness of its president (Rudolph E. Zeruneith) commencing with the conclusion of that trial, coupled with the depression of its sales by respondent's acts complained of in the present suit, made it impractical for petitioner to undertake the trial of this case during the pendency of the earlier suit or soon after the conclusion thereof (App. pp. 23a and 24a).

The verified showing contained in petitioner's Petition for Rehearing and Motion to Vacate in the District Court (App. pp. 23a-24a) shows that petitioner's president was hospitalized for two months, in April and May of 1952, and that he was thereafter confined to his home in a convalescent state for a long time and was compelled drastically to reduce his activities, and that in 1955 suffered a further serious illness which curtailed his activities, and that, as a result, he had not been able to attend to any business matters until the middle of 1957, and that this placed upon petitioner's other officers and key personnel added burdens and increased the difficulties of proceeding with the trial of this action until 1956.

The verified showing contained in petitioner's Petition for Rehearing and Motion to Vacate in the District Court (App. p. 25a) further shows that petitioner's attorney was under severe handicap in 1952, 1953 and 1954 due to his wife's

* which Appendices are a reproduction of only a fraction of the 123 docket-entries, of the transcripts of the 8 hearings before trial, of the 9 hearings during recesses in the trial, of the 14 depositions (some taken before the trial, and some during recesses in the trial), of the 2314 pages of transcript of the trial, and of the many documentary exhibits.

serious illness throughout 1952 and 1953 and the first half of 1954, and her long periods of hospitalization in Philadelphia and in New York in 1952, 1953 and 1954, and her resultant death on June 20, 1954, and due to the need for his attendance upon her during her illness and the need for his attendance upon his minor children (one of whom was also hospitalized during 1954), and that, as a result, his professional activities were unavoidably curtailed.

REASONS RELIED ON FOR GRANTING THE WRIT.

The Writ of Certiorari should be granted because the decision of the United States Court of Appeals for the Third Circuit sought to be reviewed

1) raises important questions as to the proper application of the Federal Rules of Civil Procedure,
2) is in conflict with the principle of this Court's decision* in *Societe Internationale vs. Rogers*, 357 U. S. 197 (at 206-8) as to the scope of Rule 41-b,
3) is in conflict with the decisions† of other federal courts as to the scope of Rule 41-b,
4) interprets Rule 41-b of the Federal Rules of Civil Procedure in conflict with the *due process* clause of the Fifth Amendment of the Constitution,
5) is in conflict with this Court's decisions as to the requirements of definiteness in a statute to satisfy the *due process of law* provisions of the 5th and 14th Amendments of the Constitution, and

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* **Societe Internationale vs. Rogers**, 357 U. S. 197, at 203:
"Because this decision raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari 355 U.S. 812, 2 L. ed 2d 30, 78 S. Ct. 61."

† **Lincoln Engineering Co. vs. Stewart-Warner Corp.**, 303 U. S. 545:
"We granted certiorari because of alleged conflict with our decision in Rogers vs. Alemite Corporation reported with Bassick Manufacturing Co. vs. Hollingshead Co., 298 U.S. 415."

6) has erroneously decided an important question of federal law and constitutional law which has not been but should be settled by this Court to effect an orderly administration of justice.

ARGUMENT.

A) Argument amplifying reasons 1, 2 and 3 relied on for the allowance of the writ.

The United States Court of Appeals for the Third Circuit has rendered a decision in conflict with the principle of this Court's decision in *Societe Internationale, etc. vs. William P. Rogers, Jr., Attorney General, etc.*; 357 U. S. 197, at 206-8 (June 16, 1958), 2 L. Ed. 2d 1255, at 1263-5, as to the scope of the first sentence of Rule 41-b;—wherein this Court held that notwithstanding the broad and all-inclusive scope seemingly given to Rule 41-b by the use of the word "failure" in the first sentence thereof,* it does *not* comprehend a failure other than the failure to go forward with the trial of the case when called for trial or a failure to comply with the rules or an order of the court "concerned with the *trial*".†

In *Societe Internationale vs. Rogers*, supra, this Court was dealing with a dismissal (under the first sentence of Rule 41-b) for plaintiff's "failure" to obey the District Court's Order under Rule 34 for the production of documents, and held that notwithstanding the seemingly broad and all-inclusive scope of Rule 41-b by the use of the word "failure" in the first sentence thereof, Rule 41-b does not

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* "For **failure** of the plaintiff to prosecute or to comply with these rules for any order of the court, a defendant may move for dismissal of an action or any claim against him."

† emphasis by the Court.

comprehend even a failure to obey a District Court's order at a pre-trial stage having no reference to the actual trial, and (pointing out that Rule 37-b covered the failure to produce documents responsive to an Order under Rule 34) reversed the lower Court's dismissal of the complaint under Rule 41-b.

This Court's decision in *Societe Internationale vs. Rogers*, supra, appears also to confirm the correctness of the reasoning of the lower Courts in

Russo vs. Sofia Bros., 2 F. R. D. 80, at 82 (S. D. N. Y.);

Adams vs. Jarka, 8 F. R. D. 571 (S. D. N. Y.);

U. S. vs. Thomson, 114 F. Supp. 874 (S. D. N. Y.).

In *Russo vs. Sofia Bros.*, supra, the Court held that the theory and purpose of Rule 41-b is "to prevent the recurrence of litigation that had reached that advanced stage", namely, litigation that had been called for trial or the trial of which plaintiff was obstructing.

In *Adams vs. Jarka*, supra, the Court interpreted Rule 41-b the same as in *Russo vs. Sofia Bros.*:—the Court, in *Adams vs. Jarka*, saying:

> "That this rule (i. e., Rule 41-b) was not intended to apply to a failure to serve the summons and complaint, is indicated by its very position among the rules, i. e., by the presence in the subdivision of the rules dealing with 'Trials'."

In *U. S. vs. Thomson*, supra, the Court held that Rule 41-b does not comprehend a dismissal of the complaint upon a ground to which the local rule of the District Court* applies, namely, "lack of prosecution" in the sense of mere passage of time, without *any* "failure of the plaintiff . . . to comply with these rules or any order of court" (within

* like the local 2-Year Rule (page 5, supra) of the District Court for the Eastern District of Pennsylvania.

the purview of Rule 41-b) and without any other "failure of the plaintiff" preventing or hindering the bringing of the case to trial or defendant's preparation for trial:

> "Dismissal under the local rule is a dismissal not provided for in Rule 41 (nor is it in conflict with Rule 41-b) . . . On the contrary, it would appear that the local court rule serves an entirely different purpose, that of regulating the court's dockets, and it must be viewed in the light of the inherent power of a court to keep its dockets clear rather than in the light of adjudicating merits of controversies."

Even though upon rehearing (App. pp. 26a-28a) the District Court refused to dismiss the complaint under Rule 41-b (and instead dismissed under its local 2-Year Rule), the District Court nevertheless disagreed with the interpretation placed upon Rule 41-b in *Russo vs. Sofia Bros.* (as well as in all reported decisions of other courts), namely, that Rule 41-b applies only to the trial stage of litigation (App. p. 28).

The Court of Appeals for the Third Circuit likewise disagreed with the interpretation placed on Rule 41-b in *Russo vs. Sofia Bros.*, supra:

> "In the *Russo* case Judge Rifkind concluded that Rule 41-b did not authorize the dismissal of a suit by a preliminary motion addressed to the pleading. In the *Russo* case a motion to dismiss a suit because the complaint had not stated a cause of action had been granted. When the suit was dismissed permission to amend the complaint had not been requested or granted. When the plaintiff later sought to file an amended complaint which did state a cause of action, Rule 41-b was raised as a barrier. As we have said the court was of the view that Rule 41-b was not applicable at the pleading stage. *We think that the court in the Russo case was in error, at least insofar as it held that Rule 41-b was inapplicable to dismissals for want of prosecution at the pleading stage. Field v. American-West African Line, Inc.,*

> 154 F. 2d 652 (2 Cir. 1946); 2 Barron & Holtzoff, Federal Practice, §918 (1950). Rule 41-b provides that a case may be dismissed 'For failure of the plaintiff to prosecute. . . .' There certainly was failure to prosecute here. That failure had lasted for a period of over five years. Whether such failure justified dismissal was within the discretion of the trial court. See, e. g., *Russell v. Cunningham*, 233 F. 2d 806 (9 Cir. 1956), n. 3."

The case of *Field vs. American-West African Line*, supra, relied on by the Court of Appeals, does not support its decision here sought to be reviewed because, as shown in part by the *per curiam* Opinion in *Field vs. American*, supra, and in part by the portions of the briefs of the parties reproduced on pages *45a* to *52a* of the *Appendix* hereto,* that case had been called for trial many times, and plaintiff had sought and obtained five adjournments of the trial and (after a sixth adjournment) the Court granted defendant's Motion to Dismiss under Rule 41-b only conditionally, namely, that a Committee be appointed and plaintiff be ready to proceed to trial within 90 days; and the case was thereafter finally dismissed under Rule 41-b only after the expiration of such 90-day period when plaintiff again moved for an extension of time and that the case be not dismissed under the Order previously entered in the case, on the ground that he was again unable to proceed with the trial.

Nor does *Russell vs. Cunningham*, 233 F. 2d 806, relied on by the Court of Appeals in its disagreement with *Russo*

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* Because the facts underlying the decision in **Field vs. American,** supra do not sufficiently appear in the reported decision, there is reproduced in the Appendix hereto the portions of the **Memorandum in Behalf of Plaintiff-Appellant** and of the **Brief on Behalf of Defendant-Respondent** in that case which set out the facts upon which the Court's decision in that case was based. These portions of the briefs in **Field vs. American** were reproduced as an **Appendix** to Plaintiff-Appellant's Petition for Rehearing in the Court of Appeals and are also found in the certified copy of the Record and Proceedings in the case at bar, filed with the present petition for writ of certiorari.

vs. Sofia Bros., support the decision of the Court of Appeals for the Third Circuit sought to be reviewed, because *Russell vs. Cunningham* was a case in which there had been a pretrial hearing and a pretrial Order setting the case for trial on a day certain, and the case was then continued and re-set for trial a second time, whereupon plaintiff moved that the trial-date again be vacated on various grounds involving witnesses, and the case was thereupon continued and re-set for trial the third time;—whereupon it was again continued to a fourth trial setting, and when called for trial upon such fourth trial setting plaintiff moved for a further continuance upon representations which the Court found to be false or not made in good faith. Thereupon the Court dismissed the Complaint.

The only other case found by respondent's counsel (and cited in its brief below) in which a complaint was dismissed for "lack of prosecution" without affording plaintiff the opportunity of a trial, and which contains any language which could possibly be construed as broad enough to sustain a dismissal under Rule 41-b solely on the basis of passage of time since the last previous proceedings taken in the case is *Salmon vs. City of Stuart*, 194 F. 2d 1004 (5 Cir. 1952). However, a reference to the pertinent portions of the *Brief and Record* in *Salmon vs. City of Stuart*, reproduced on pages *52a* to *58a* of the *Appendix* hereto, shows that the controversy involved in that case had been in and out of the courts of Florida for a period of over 14 years commencing in 1937,* and after filing her complaint (in the action in which the above-cited decision was rendered) and before the answer thereto was due, plaintiff obtained a stipulation allowing her to file an amended complaint and providing that defendant need not answer until such amended complaint had been filed. Plaintiff having failed

* all prior to the commencement in 1949 of the action in which the above-cited decision was rendered

to file such amended complaint for more than a year, without any valid reason for her failure to do so, defendant moved to dismiss for lack of prosecution, which was granted.

In the *Societe Internationale* case, the Court of Appeals had invoked Rule 41-b because of its doubt as to the applicability of Rule 37-b(2) in that case.

In the case at bar, the Court of Appeals invoked Rule 41-b because it found that the local 2-Year Rule of the District Court which expressly dealt with failure to prosecute in the sense of mere passage of time without any proceedings in the case, could not be enforced in the case at bar because of the Clerk's failure to send the notice immediately at the end of the 2-year period provided by such Rule or indeed for more than 3 years after the expiration of such 2-year period.

In the case at bar, just as in the *Societe Internationale* case, the appellate Court's inability or reluctance to enforce the otherwise directly applicable rule, does not warrant or constitute any authority for invoking or applying Rule 41-b which is manifestly inapplicable in the case at bar just as it was inapplicable in the *Societe Internationale* case.

If (as held by this Court) the word "failure" in the first sentence of Rule 41-b does not comprehend a failure to comply with an order of the court not concerned with the trial, then, *a fortiori*, the phrase "failure of the plaintiff to prosecute" in Rule 41-b can not be applicable to dismiss the complaint without a trial, in an action which had *never* been listed, set or called for trial and in which there had *never* been any "failure of the plaintiff . . . to comply with these rules or any order of court" within the purview of Rule 41-b.

Many (if not all) District Courts have a local rule sim-

ilar to the local 2-Year Rule of the District Court below.* All such local rules have been designed and used solely to remove from the District Court's backlog of pending cases, those which plaintiff did not wish to have tried, and such local rules have been used only as a convenient way of requiring the parties to advise the Clerk whether they wish to have the case tried. Thus, those local rules have been used as a way of prodding the parties to advise the Clerk of their intentions (to try or abandon) with respect to a case in which no proceedings had been taken for a certain length of time.

As pointed out in the Wohlman Affidavit (App. pp. 58a-59a), in none of the 167 cases dismissed in the Eastern District of Pennsylvania under its local 2-Year Rule, during a 4-year period, had there been any response by either party to the Clerk's letter of notice under the 2-Year Rule and hence were dismissed for the manifest lack of interest of the parties in a trial, after they were notified.

In no instance was a case ever dismissed under the District Court's 2-Year Rule where, after receipt of the Clerk's notice, either party advised the Clerk that he wished to have the case tried.

There is not a single reported decision of any other appellate Court or District Court having a similar local rule in which the case was dismissed under its local rule merely

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* See, by way of example, Rule 48 of the District Court for the Western District of Washington:

> "Provided furthe that all cases which have been pending in this Co t for more than one year without any proceeding of record having been taken may be dismissed by the Court on its own motion for want of prosecution, at the call of the calendar at the beginning of each term."

Under this local Rule, the Court sustained the dismissal of the complaint in **Hicks vs. Bekins,** 115 F. 2d 406 (9 Cir. 1940), after the case had been called on the trial-calendar sixteen times, without response, over a two-year period, and after the Clerk's subsequent letter to counsel that the case would be called for dismissal under Rule 48 on a day certain, to which call there was likewise no response.

upon the passage of a certain length of time and where the case had never been called for trial and in which there was no default on the part of plaintiff which prevented the case from being called for trial or which hindered defendant's preparation for trial.

Wholesale Supply Co. vs. South Chester Tube Co., 20 F. R. D. 310, at 313 (E. D. Pa.):

> "the rule (i. e., the local 2-Year Rule) is for administrative purposes and confers no substantive right upon the defendant to insist that the case be marked dismissed."

This decision also confirms what has been the Court's and the Clerk's uniform practice under the local 2-Year Rule, namely, that notwithstanding the portion of the rule which says that an application should be made to the Court (that the case be not deemed abandoned or dismissed), any paper filed by plaintiff indicating its intention to proceed to trial was taken as an application to the Court requesting the case not be marked dismissed:

> "We take the entry of appearance of Beechwood & Lovett as an application to the Court requesting that the case not be marked dismissed" (20 F. R. D. 313).

B) Argument amplifying reasons 4-6 relied on for the allowance of the writ.

While holding that a plaintiff's failure to produce the documents because of restrictive legal processes of a foreign government was nevertheless a *refusal* to produce within the purview of Rule 37-b(2), this Court also held in *Societe Internationale*, supra, that even a dismissal of the complaint under Rule 37-b(2) for such non-compliance with a pre-trial production order, was a violation of the *due process of law* requirement of the Fifth Amendment of the Constitu-

tion, and that the case should be tried on the merits, with such handicaps as the trial Court may impose on plaintiff because of its non-compliance with the pretrial production-order.

"The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U. S. 409, *42 L. Ed. 215*, 17 S. Ct. 841, and *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, *53 L. Ed. 530*, 29 S. Ct. 370, 15 Ann Cas. 645. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportuni y for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See *Notes of Advisory Committee on Rules, Rule 37, 28 U. S. C. (1952 Ed.), p. 4325.*

"In *Hovey v. Elliott* (U. S.), supra, it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree pro confesso without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. This holding was substantially modified by *Hammond Packing Co. v. Arkansas* (U. S.), supra, where the Court ruled that a state court, consistently with the *Due Process Clause of the Fourteenth Amendment*, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. The *Hovey* case was distinguished on grounds that the defendant there was denied his right to defend 'as a mere punishment'; due process was found preserved in *Hammond* on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence '. . . was but an admission of the want of merit in the asserted defense'. 212 U. S. at 350, 351. But the Court took

care to emphasize that the defendant had not been penalized '. . . for a failure to do that which it may not have been in its power to do'. All the State had required 'was a bona fide effort to comply with an order . . . , and therefore any reasonable showing of an inability to comply would have satisfied the requirements . . .' of the order. 212 U. S. at 347.

"These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. Cf. *Tot v. United States*, 319 U. S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241. Certainly substantial constitutional questions are provoked by such action" (357 U. S. 209-210).

"It (plaintiff)* explicity recognizes that it is subject to procedural rules of United States courts in this litigation and has made full efforts to follow these rules. It asserts no immunity from them. It asserts only its *inability* to comply because of foreign law.

"In view of . . . the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."

"It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events. So much

*parenthetical interpolation supplied by counsel

indeed petitioner concedes. But *these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits.**

"On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective. It may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to commence at once trial on the merits. We decide only that on this record dismissal of the complaint with prejudice was not justified.

"The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

"It is so ordered" (357 U. S. 212-3).

If it is deemed that Rule 41-b was intended to be applicable and effective *also* to dismiss a complaint without a trial in an action which had never been listed, set or called for trial and in which there had never been "failure of the plaintiff . . . to comply with these rules or any order of court" within the purview of Rule 41-b, then the Rule 41-b is unconstitutional because it fails to satisfy the essential of due process of law required by the Fifth Amendment of the Constitution, in that it does not provide any standard or criteria by which a plaintiff may know what *length of time* between his Praecipe requesting a trial-listing and the last previous proceedings therein by either party or by the court will subject him to a dismissal of his complaint and the forfeiture of his property rights represented by the claim pleaded therein.

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* this emphasis supplied by counsel.

Argument Amplifying Reasons 4, 5 and 6

Connally vs. General Construction Co., 269 U. S. 385, 391 (70 L. Ed. 322, 328):

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law" (citing authorities).

Yu Cong Eng vs. Trinidad, 271 U. S. 500, 518 (70 L. Ed. 1059, 1067):

> ". . . the principle that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law" (citing authorities).

Jordan vs. DeGeorge, 341 U. S. 223, 231 (95 L. Ed. 886, 892):

> ". . . whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices" (citing authority).

Burstyn vs. Wilson, 343 U. S. 495, 533 (96 L. Ed. 1100, 1122):

> "On the basis of such a portmanteau word as 'sacrilegious', the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, subjective determination."

A comparable situation would result if (by way of example) the 30-day time-standard in Rule 73 were deleted. Thus, if Rule 73 were not to specify a 30-day (or some other definite) appeal-period, and either contained no provision whatever about the time-element or merely provided that the appeal must be taken within a reasonable time after the entry of the judgment, it would necessarily be unconstitu-

tional because there would be no way for litigant ever to know just what would be a reasonable time either with or without relation to the circumstance of the case, and a litigant would be always in jeopardy of having his rights forfeited because he misguessed just when he must file his appeal.

Conclusion.

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

LEONARD L. KALISH,
Attorney for Petitioner.

APPENDIX.

Opinion
of the Court of Appeals for the
Third Circuit.

(Filed February 18, 1959, and reported at 265 F. 2d 189.)

Argued November 17, 1958.

Before: BIGGS, *Chief Judge*, and McLAUGHLIN and KALODNER, *Circuit Judges*.

By BIGGS, Chief Judge.

The court below dismissed without prejudice a suit filed by the appellant, Ordnance Gauge Company, against Jacquard Knitting Machine Company. Ordnance has appealed.

Extensive litigation between the parties commenced on April 19, 1950, when Jacquard, defendant-appellee in the instant case, filed a complaint against Ordnance, at Civil Action No. 10,850 in the court below, alleging infringement of the United States Patent No. 2,397,456. The patent discloses a method of transferring stitches from one needle to another in knitting machines or in a loop-receiving device. Ordnance filed an answer and a counterclaim denying infringement and sought to have the patent declared invalid and also prayed for an injunction restraining Jacquard from instituting or threatening suit against its, Ordnance's, customers alleging that they had infringed Jacquard's patent.

After the filing of the answer and counterclaim in Civil Action No. 10,850, but before the trial of that action, Ordnance on May 3, 1951, filed the suit at bar, Civil Action No. 12,206 in the court below. Ordnance's complaint alleges violation by Jacquard of the antitrust laws in connection with United States Patent No. 2,397,456, makes reference to the suit at Civ Action No. 10,850, alleges that Patent No. 2,397,456 is invalid and was not infringed, asserts that

Jacquard was guilty of unfair competition, trade libel and slander, and seeks damages and other relief. An answer was filed by Jacquard on June 29, 1951, but no further action of any kind, insofar as the record shows, was taken in the suit for a period of more than five years, indeed not until November 8, 1956. The trial of Civil Action No. 10,850 was commenced on July 19, 1951, and was concluded April 16, 1952. The court below filed an opinion[1] and entered judgment on November 14, 1952, holding the patent invalid and denying relief to Ordnance on its counterclaim. Jacquard and Ordnance cross-appealed to this court. We affirmed the judgment of the court below.[2]

On November 8, 1956, the Clerk of the court below mailed to the attorneys for both Jacquard and Ordnance a notice[3] that Civil Action No. 12,206 would be dismissed under the local "Two-Year Rule",[4] unless application was

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[1] Jacquard Knitting Mach. Co. v. Ordnance Gauge Co., 108 F. Supp. 59 (E.D. Pa. 1952).

[2] 213 F. 2d 503 (1954).

[3] The notice was as follows: "The record in the above case indicates that no proceedings have been taken by the parties for a period of two consecutive years. Unless application is made to the Court within two weeks from the date of this letter, the case will be deemed abandoned and stand dismissed in accordance with a local rule of Court. Such dismissal shall be without prejudice and with costs against the plaintiff.

"If this case has been settled, a stipulation or order to dismiss filed by the parties in accordance with Rule 41 of the Federal Rules of Civil Procedure will preclude the necessity of entering a cost judgment on the judgment indexes."

[4] The "Two-Year Rule" under which the Clerk of Court acted was promulgated November 24, 1952, and is as follows:

"In every civil action, not answered 'Ready for Trial' upon a preliminary call, in which no proceeding has been taken for a period of two consecutive years, the Clerk shall, immediately upon the expiration of such two year period, send notice to counsel of record or, if none, to the parties that, unless the Court upon application made within two weeks after such notice shall otherwise order, the case will be deemed to be abandoned and stand dismissed and, in the absence of such application to or order by the Court the Clerk shall without special order enter upon the record 'Dismissed under

made to the district court. Ordnance responded on November 21, 1956, by filing a praecipe directing the Clerk of the District Court to place the case on the jury trial calendar. The Clerk prepared a "calendar card"[5] and gave the case a number for the preparation of the list for preliminary call. Two days later, on November 23, 1956, Ordnance filed an application to the court that the action should not be "deemed [to be] abandoned nor dismissed".[6] Ordnance's application was listed for argument on December 16, 1956. There was a continuance, however, at Jacquard's request and on March 17, 1957, Jacquard filed a motion pursuant to Rule 41(b), Fed. R. Civ. Proc., 28 U. S. C., to dismiss the suit at bar for want of prosecution with due diligence. Affidavits were filed.[7]

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the rule' and tax the costs against the plaintiff. Dismissal under this rule shall be without prejudice.

"This rule shall on and after December 1, 1952, be in full force in cases then pending or thereafter brought."

The rule of the court below which was effective until December 1, 1952, provided:

"Every Civil Action in which no proceeding has been taken for a period of two consecutive years shall, immediately upon the expiration of such two year period, be deemed to have been abandoned and stand dismissed, and the Clerk shall thereupon, without special order, enter upon the record 'Dismissed under the rule' and tax the costs against the plaintiff. Dismissals under this rule shall be without prejudice.

"This rule shall on and after the 2nd day of January, 1940, be in full force in all actions then pending or thereafter brought."

[5] A calendar card is an abbreviated record of the case in the district court, and is used principally to facilitate the preparation of trial lists.

[6] Ordnance's application of November 23, 1956 was as follows: "Plaintiff requests that this Action be not deemed abandoned nor dismissed, for lack of prosecution, because it is not plaintiff's intention to abandon this Action, and plaintiff has filed a Praecipe requesting that this Action be placed on the trial calendar."

[7] Two affidavits were filed by the defendant June 19, 1957. One affiant, Mr. Jerome G. Lee, was employed by the firm of J. Stanley Preston, counsel for Jacquard in Civil Action No. 10,850. See p. 1, supra. Lee stated, through his affidavit that it was his observation and belief that "all conferences, discussions, and correspondence" relating to Civil Action No. 10,850 and deci-

Appendix
Opinion of the Court of Appeals

Ordnance's application that the suit should not be deemed to be abandoned or dismissed and Jacquard's motion to dismiss were argued together on June 24, 1957. On August 19, 1957, the court below granted Jacquard's motion to dismiss the suit at bar for failure to prosecute it diligently pursuant to Rule 41(b) and without opinion ordered the action at bar dismissed. Ordnance filed a petition for rehearing.[8] A hearing was had on this petition and on January 21, 1958, the court below filed an opinion[9] ruling

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sions leading up to the suit were conducted by and between Mr. Preston and Mr. Harry Albertman, the general manager of Jacquard; and that J. Stanley Preston died in October 1954.

The other affiant was Mr. Charles F. Miller, who, at the time of trial of Civil Action No. 10,850, was Chief Engineer of Jacquard. At the time of making the affidavit, Mr. Miller was Vice-President of Wildman-Jacquard Co., a successor company. In his affidavit Mr. Miller stated that Mr. Albertman was unable to testify in Civil Action No. 10,850 because of "serious physical and mental disabilities," and that "At the present time [June 18, 1957], Mr. Albertman is even more seriously disabled, both physically and mentally"; that on June 29, 1956, Jacquard merged with Wildman Mfg. Co. to form the Wildman-Jacquard Co. and that Jacquard's factory in Philadelphia was closed; that no one in the Wildman-Jacquard organization could testify that the files of J. Stanley Preston relating to litigation between Jacquard and Ordnance, transferred to Jacquard after Preston's death, are complete or that no documents had been lost.

A third affidavit was filed by defendant Jacquard on March 5, 1958. It was sworn to on June 20, 1957 by Mr. Robert D. Donley, the Secretary of Jacquard. Apparently it was before the court on June 24, 1957 but was not marked "filed" until March 5, 1958. The affiant stated in substance that defendant's assets and corporate affiliations had undergone a series of changes since June of 1954.

No affidavits were filed by plaintiff, Ordnance Gauge Co.

[8] Ordnance's reasons in seeking a vacation of the judgment of dismissal were set out in its petition for rehearing. These reasons are that Civil Action No. 10,850 was not concluded until August 19, 1954, when the time for filing a petition for certiorari to the Supreme Court expired; that that suit by Jacquard, constituting a substantial drain on Ordnance's resources, made prosecution of the present suit impractical; that the incapacitating illness of Ordnance's president added to the difficulties of diligent prosecution; that the attorney for Ordnance had to curtail his activities during the period 1952-56 because of serious illnesses and death in his immediate family.

[9] See 21 F.R.D. 575 (E.D. Pa. 1958).

against Jacquard, vacated its judgment of August 19, 1957, but ordered Ordnance's action dismissed without prejudice under the Two-Year Rule. Ordnance now appeals from this judgment.

Ordnance contends that the court below erred in dismissing its suit under the Two-Year Rule on January 21, 1958, as it had erred previously in dismissing the suit under Rule 41(b) on August 19, 1957. Ordnance asserts that the court below misconstrued the Two-Year Rule and applied it prejudicially contending that the court itself failed in its duty through the inaction of its Clerk's office in failing for more than three years to give notice to Ordnance that it would apply the Two-Year Rule when the rule itself required the Clerk to give notice "immediately" upon expiration of the prescribed two year period and that Ordnance's suit is now barred by the applicable statutes of limitations.[10] Quite aside from any of the foregoing, Ordnance asserts that the rule is inapplicable by its own terms to the case at bar and that the court has misconstrued it. There is no doubt that the court below dismissed the instant case by application of the Two-Year Rule for the final line of the opinion stated: "The case will . . . be dismissed without prejudice, under the local rule." 21 FRD at p. 577.

[10] It is not clear from the complaint when or where the acts complained of, alleged to be a conspiracy to monopolize trade, occurred. Other acts seem to be charged against Jacquard alone. Three causes of action are set out in the complaint, and none too clearly. Some of the events complained of are alleged to have occurred at or about the time of the Knitting & Allied Crafts Exposition in New York State on April 24, 1950, subsequent to the filing of the complaint at Civil Action No. 10,850 on April 19, 1950. Ordnance has not stated in its pleadings, in its brief, or in oral argument the applicable statutes of limitations which may have been those of States; some of the acts complained of certainly occurred prior to the Act of July 7, 1955, 69 Stat. 283, effective January 7, 1956, 15 U.S.C.A. § 15b. In view of the lack of more thorough explication by Ordnance as to the applicable statute or statutes of limitations we cannot state with positiveness whether or not Ordnance's actions are now barred.

We therefore must determine whether the court erred in applying this rule under the circumstances at bar.[11]

The assertion that the court below misconstrued or misapplied the Two-Year Rule requires an examination of its provisions. Ordnance insists that the phrase "In every civil action not answered 'Ready for Trial' upon a preliminary call . . . shall . . . " be subject to the Rule's provisions, must be construed as if it read "In every civil action which shall have been on preliminary call and not answered 'Ready for 'Trial' . . . shall . . . " be subject to the Rule's provisions. This interpretation would exclude from the operation of the rule any case "not answered 'Ready for Trial' upon a preliminary call," such as the case at bar. We cannot accept this construction. The rule may not be as clear as it should be but its purpose as a successor to the former "Two-Year Dismissal Rule"[12] was to wipe dead cases from the court's civil docket. This interpretation sought by Ordnance would emasculate the rule and render it largely nugatory for it would not affect cases unless they had been on preliminary call. It cannot be supported. Under the local practice a case does not come up for preliminary call unless counsel "issues" a "trial order". If counsel for the defendant does not do so, and the burden of prosecuting an action is not on the defendant, the plaintiff could forever avoid a calendar call and thus avoid the impact of the Two-Year Rule by simply not issuing the "trial order" referred to.

Stated in its simplest terms the Two-Year Rule provides that if no action be taken in a suit for two consecutive years the Clerk shall "immediately" send notices to the

[11] We cannot say that the Two Year Rule has not been vigorously applied In the two years immediately following its effective date 115 cases were dismissed under it.

[12] See note 4 **supra.**

counsel for the parties that unless the court, acting upon an application made within two weeks[13] orders the case restored, it shall stand dismissed. The latter part of the rule simply provides that if the court does not make an order restoring the case, the Clerk shall, acting for the court, enter an order upon the record phrased "Dismissed under the rule." and tax the costs against the plaintiff. Such a dismissal is without prejudice. The making of an application by the plaintiff, such as filing a praecipe or a petition that the action be deemed not dismissed, does not automatically save the suit from dismissal. If no application is made the Clerk, performing a ministerial duty, enters judgment against the plaintiff in the form just referred to. If an application is made to the court within the two weeks period, it then rests within the sound legal discretion of the court to grant the application and restore the case to the docket or to reject the application and refuse restoration.

The case lay dormant for nearly five and a half years. No action of any kind was taken by Ordnance until after the Clerk's notices were sent on November 8, 1956. The petition for rehearing filed on behalf of Ordnance does not state any sound legally cognizable reason for delay in the prosecution. What is stated appeals to mercy rather than to reason. Jacquard by its affidavits sets out reasons why it believes it would be prejudiced if the case was to be tried. We find these reasons none too convincing. The issue is one which lies within the sound legal discretion of the court below. Cf. Wholesale Supply Co. v. South Chester Tube Co., 20 FRD 310, 313 (E. D. Pa. 1957).

But there is another issue. Ordnance insists that it

[13] We assume that the two weeks period commences upon the dispatch of the Clerk's notice. This portion of the rule requires clarification. The date from which the two weeks period commences to run is not pertinent here for Ordnance's praecipe to restore the case was made within 13 days of the dispatch of the notices by the Clerk.

was prejudiced because the Clerk did not give notice to its counsel "immediately" upon the expiration of the two year period, as the Two-Year Rule requires, *viz.*, on June 29, 1953, but waited over three years before doing so. This cannot be deemed to be compliance with the rule. We are not unmindful of the fact that the dismissal is without prejudice and we cannot say that Ordnance's claims are now barred by statutes of limitations. But where a suit is stricken from the docket of a court fairness would seem to require adherence to the strict terms of its own rule by the dismissing court. The sending of the notice three years after the expiration of the two year period does not meet the test of immediacy. The rule should be amended and should specify a period in which the notice must be sent.[1] We are of the opinion that it was properly applicable but improperly executed under the circumstances at bar.

We must now discuss the application of Rule 41(b), Fed. R. Civ. Proc., 28 U.S.C. The Court below in its opinion, 21 FRD 575 (E. D. Pa., 1958), disagreed with the ruling of Russo v. Sofia Bros., 2 FRD 80 (S.D. N.Y. 1941), and held that Rule 41(b) authorized the dismissal of the suit. In the Russo case Judge Rifkind concluded that Rule 41(b) did not authorize the dismissal of a suit by a preliminary motion addressed to the pleading. In the Russo case a motion to dismiss a suit because the complaint had not stated a cause of action had been granted. When the suit was dismissed permission to amend the complaint had not been requested or granted. When the plaintiff later sought to file an amended complaint which did state a cause of action, Rule 41(b) was raised as a barrier. As we have said the court was of the view that Rule 41(b) was not applicable at the pleading stage. We think that the court in the Russo case was in

[1] Our statements are not intended to reflect on an overburdened and efficient court or its overburdened and efficient Clerk's office.

error, at least insofar as it held that Rule 41(b) was inapplicable to dismissals for want of prosecution at the pleading stage. Field v. American-West African Line, Inc., 154 F. 2d 652 (2 Cir. 1946); 2 Barron & Holtzoff, Federal Practice § 918 (1950). Rule 41(b) provides that a case may be dismissed "For failure of the plaintiff to prosecute. . . ." There certainly was failure to prosecute here. That failure had lasted for a period of over five years. Whether such failure justified dismissal was within the discretion of the trial court. See, *e.g.*, Russell v. Cunningham, 233 F. 2d 806 (9 Cir. 1956), n. 3. A dismissal under Rule 41(b) operates as a dismissal on the merits unless the court shall specify otherwise. See the last sentence of the rule. This provision apparently was overlooked by the court below. We hold that the suit at bar must stand dismissed under Rule 41(b) but that the dismissal should not operate as a dismissal on the merits.

We have ruled on the applicability of Rule 41(b) because of the well established doctrine that a judgment appealed from may be affirmed on a valid ground, even if the basis asserted by the court below as the basis of its decision is insufficient or invalid. Parkway Baking Co. v. Freihofer Baking Co., 255 F. 2d 641, 647 (3 Cir. 1958); Lanova Corp. v. National Supply Co., 116 F. 2d 235, 239 (3 Cir. 1941). The court below was correct in its first order dismissing the case at bar for want of prosecution under Rule 41(b). Since the court below was of the view that the case should be dismissed without prejudice and thought that it could not do so under Rule 41(b), and the provision of Rule 41(b) as to adjudication upon the merits can be treated, under the circumstances of the case at bar as the equivalent of a dismissal without prejudice, we can perceive no reason why the judgment of the court below should not be affirmed.

In view of our ruling we see no reason for passing upon the contentions of Jacquard that the issues presented by

the case at bar were adjudicated by the judgment of the court below at Civil Action No. 10,850.

Accordingly, the judgment of the court below will be affirmed.

Judgment of the Court of Appeals for the Third Circuit

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN and KALODNER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest: IDA O. CRESKOFF, Clerk.

February 18, 1959.

Appendix
Opinion of the Court of Appeals on Rehearing

Opinion
of the Court of Appeals for the
Third Circuit.

(Filed April 9, 1959, and reported at 265 F. 2d 195.)

ON PETITION FOR REHEARING

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and KALODNER, *Circuit Judges*.

PER CURIAM.

Ordnance has filed a petition for rehearing based in part on the application of the so-called "Two Year" Rules of the court below and has filed also an extensive tabulation of cases dismissed by the court below under these rules. We did not affirm the dismissal of Ordnance's action under these rules and it follows that this portion of the petition for rehearing is irrelevant.

The real thrust of the petition for rehearing is directed to language in the opinion in Societe Internationale v. Rogers, 357 U.S. 197, 206-208 (1958). We had this decision before us at the time our opinion was handed down but we considered that it was not relevant to the issues presented. However, since Ordnance has laid so much emphasis upon this decision in its petition for rehearing we think it desirable to discuss the decision in this opinion.

In our prior opinion, as appears, we expressed our disagreement with the ruling in Russo v. Sofia Bros., 2 F.R.D. 80 (S.D. N.Y. 1941), which concluded that Rule 41(b), Fed. R. Civ. Proc., 28 U.S.C., did not authorize the dismissal of a

suit by a preliminary motion addressed to the sufficiency of the pleading

In Societe Internationale v. Rogers, the Supreme Court held that Rule 41(b) could not serve as the basis for dismissal of an action when documents sought by the plaintiff had not been produced, and that the power of a court to dismiss a complaint because of non-compliance with a production order depended exclusively upon Rule 37. The Supreme Court, by Mr. Justice Harlan, after quoting the first sentence of Rule 41(b), said *inter alia*, "There is no need to resort to Rule 41(b) which appears in that part of the Rules concerned with *trials* and which lacks . . . specific references to discovery." Ordnance lays much emphasis on the use of the word "*trials*" italicized by the Supreme Court, and in effect contends that the provisions of Rule 41(b) authorize dismissal only at trial. We cannot agree. The substance of the Supreme Court's ruling in Societe Internationale was that Rule 41(b) was not available to dismiss an action when documents were not produced pursuant to a demand made under Rule 34.

We are of the view that Chapter VI of the Federal Rules of Civil Procedure, relating to "Trials", is an appropriate and natural heading for a ru authorizing a motion by a defendant designed to bring a case to trial or cause its dismissal for want of prosecution, and if a plaintiff fails to prosecute, the defendant is entitled to move under the first sentence of Rule 41(b) to dismiss the action "For failure of the plaintiff to prosecute . . . ", as Jacquard did here. See Burns Mortgage Co. v. Stoudt, 2 F.R.D. 219, 220 (E.D. Pa. 1942).

We know of no other provision of the Federal Rules of Civil Procedure which authorizes dismissal for failure to prosecute. If the provisions of Rule 41(b) quoted above are not applicable, the only remedy available to a defendant

to cause the dismissal of an action for want of prosecution would be the local rules of the respective United States district courts, such as the "Two Year" Rule of 1952 of the court below. We cannot believe that this was the result intended by the framers of the Civil Rules.

For these reasons as well as for those stated in our principal opinion we conclude that we have applied correctly the provisions of Rule 41(b) in the case at bar. Accordingly the petition for rehearing will be denied.

12206 CASE NUMBER	Ordnance Gauge Co. v. Jacquard Knitting Machine Co., Inc.	J	695
11/21/56 DATE FILED	STYLE OF CASE	TYPE OF CASE	CALENDAR NUMBER

ATTORNEY FOR PLAINTIFF	JURY TRIAL REQUESTED BY: PLAINTIFF	DEFENDANT	ATTORNEY FOR DEFENDANT
Leonard L. Kalish			H. Francis De Lone

ACCOUNTING RECORD COMPLETED

PROCEEDINGS RECORD COMPLETED 9/18/57 C.A. 2 on motion to dismiss

DATE	MEMORANDA	DATE	MEMORANDA
	Dismissed – 8/5-57		

AO 78

Clerk's Calendar Card

Appendix.
Excerpts from Briefs in Field vs. American

Excerpts from the
Memorandum in behalf of Plaintiff-Appellant
in the case of
Arthur Field v. American-West African Lines, Inc.
154 F. 2d 652 (2 Cir. 1946)

STATEMENT.

This is an appeal by the plaintiff from a judgment dismissing his complaint for lack of prosecution. The judgment was entered in the Clerk's office of the United States District Court, for the Southern District of New York, on February 16th, 1945. (88)

FACTS

* * * * * * * * * *

The complaint was served on November 12th, 1940. At that time, the plaintiff was an inpatient at the U. S. Marine Hospital at Stapleton, Staten Island. On December 7th, 1940, he was removed from Stapleton, and transferred to Bellevue Hospital. On January 6th, 1941, he was committed to Brooklyn State Hospital for the Insane. He was released on April 29th, 1941.

On May 14th, 1941, plaintiff served his bill of particulars. (14-16) On May 16th, issue was joined by the service of defendant's answer. (14) On June 2nd, 1941, the plaintiff's deposition was taken by defendant. (34)

* * * * * * * * * *

Thereafter, the plaintiff sought and obtained the following adjournments:

Appendix

Excerpts from Briefs in Field vs. American

From April 27th, 1942, to May 11th, 1942; from May 13th, 1942, to May 15th, 1942; from May 14th, 1942, to October 19th, 1942; from October 15th, 1942, to December, 1942; from December 11th, 1942, to May, 1943. (37a, 38, 40, 41, 47).

* * * * * * * * * *

On September 22nd, 1943, this case was marked off the calendar by consent of both parties. (48)

On or about March 24th, 1944, the defendant moved to dismiss this action for lack of prosecution. This motion was denied by Judge Hulbert, without prejudice to renewal by the defendant. (56)

* * * * * * * * * *

In October, 1944, the defendant renewed its motion to dismiss. This motion was granted by Judge Rifkind, unless a Committee was appointed and the plaintiff was ready to proceed to trial, within ninety days. (70-71)

Although efforts were made to have a Committee appointed, it was not done, due to the expense entailed, and further, because the plaintiff had no estate, other than this claim for damages. (74-75)

On January 26th, 1945, the plaintiff moved for an extension of time within which to comply with the order of Judge Rifkind. It was urged, that the plaintiff was still mentally incompetent and unable to attend at the trial. It was also sought to have a guardian ad litem appointed for the plaintiff. (72-78) This motion came on before Judge Coxe, and was denied on the ground, that no adequate showing had been made, for a further extension of time. (85)

Appendix

Excerpts from Briefs in Field vs. American

Excerpts from the
Brief on Behalf of Defendant-Respondent
in the case of
Arthur Field v. American-West African Lines, Inc.
154 F. 2d. 652 (1946)

STATEMENT

This is an appeal by plaintiff from a judgment entered February 16, 1945, on an order of Judge Coxe, dismissing the action for lack of prosecution. The action was dismissed on the ground that the plaintiff had failed to comply with the order of Judge Rifkind dated October 20, 1944, which conditionally granted defendant's motion of September 6, 1944, to dismiss the action for lack of prosecution unless a committee was appointed and the plaintiff was ready to proceed with the trial within ninety (90) days and on the further ground that no adequate showing was made by plaintiff for a further extension of time (p. 71).

PROCEDURAL FACTS

* * * * * * * * *

The summons and complaint were served November 12, 1940, and on December 10, 1940, defendant appeared and moved for a bill of particulars. Plaintiff was ordered to serve and file a bill of particulars on January 10, 1941, and four months later, on May 14, 1941, the particulars were served. On May 16, 1941, immediately upon receipt of the bill of particulars, defendant served its answer, together with a notice to examine plaintiff before trial, yet plaintiff was not presented for this examination until approximately seven months later, on December 10, 1941 (p. 60). (Plain-

tiff's statement in his brief, p. 2, that this examination was held June 2, 1941, is erroneous.)

When the case appeared on the calendar on January 16, 1942, defendant, on consent, obtained an adjournment to March 16, 1942, because its witnesses were at sea and defendant had not been in a position to take the depositions of these witnesses because of plaintiff's delay of four months in furnishing a bill of particulars and delay of seven months in appearing for his examination before trial. On March 16, 1942, defendant again, on consent, obtained an adjournment because its witnesses had not yet arrived in port, and the case was adjourned to April 26, 1942.

When the case came on the calendar on April 27, 1942, defendant's witnesses were in port and defendant applied to put the case at the head of the calendar for trial on May 4, 1942. This was opposed by plaintiff on the following grounds (pp. 37A-37D).

1. That a witness, Richard Best, was not in New York and was expected to return about the middle of May, 1942;

2. "For a long period of time, after the plaintiff was released from the Brooklyn State Hospital, it was not only difficult, but nerve racking to consult with him for the reason that plaintiff claimed he had lost his power of speech, and his answers to questions were made in writing."

3. Counsel for plaintiff was expected to be engaged on trial in the Supreme Court of New York County on May 8, 1942, and also in the United States District Court for the Southern District of New York on May 4, 1942;

4. Plaintiff requested that the case be put on the head of the calendar on May 18, 1942, at which time he expected to be ready for trial.

Appendix

Excerpts from Briefs in Field vs. American

With respect to reason No. 2 that plaintiff was unable to talk after he was released from the hospital, the Court's attention is directed to the fact that plaintiff states that he was released from this hospital on April 29, 1941. He was examined before trial on December 10, 1941, the examination consisting of 57 typewritten pages. Plaintiff admitted in this examination that he worked practically continuously from July 15, 1941, up to December 10, 1941, the date of his examination. Thus, there can be no merit to plaintiff's contention on page 3 of his brief that the case could not be then properly prepared for trial because plaintiff could not talk. Furthermore, plaintiff had taken the deposition of Terrence P. O'Brien on June 30, 1941, who admitted that he and Field had conversations about the case just before O'Brien's examination. This also shows that there was no reason for the delay to December 10, 1941, of Field's examination, which had been noticed for June 2, 1941.

This application was heard by Judge Goddard who entered an order placing the case at the head of the calendar for May 11, 1942 (p. 37F). Defendant duly issued its subpoenas and had its witnesses on hand and was ready to proceed with the trial of this case when, on May 12th, 1942, the plaintiff again applied to adjourn the case (p. 81). Judge Goddard again heard the application for adjournment on May 13, 1942, and, after an extensive hearing, entered an order placing the case on the day calendar for Friday, May 15, 1942, the first case to be sent out for trial (p. 39). After the case was thus set down for trial plaintiff's counsel orally advised defendant's counsel that he would not proceed on May 15, 1942. Defendant then made an application before Judge Goddard to have the date of trial settled peremptorily, as defendant was ready to proceed (p. 39A). Judge Goddard adjourned the trial to October 19, 1942, on the understanding that defendant could

apply for an adjournment if its witnesses were not available on that date. In order to preserve some of its proof, defendant took the depositions of two of its witnesses on May 20, 1942, which consisted of 139 typewritten pages, and the deposition of another witness on May 25, 1942, consisting of 75 typewritten pages.

When the case again appeared on the calendar on October 15, 1942, plaintiff again applied to adjourn it, which was strenuously opposed by the defendant (p. 41). It was again adjourned to December 1, 1942. On December 10, 1942, defendant made another application to get the case on for trial (p. 43). Plaintiff opposed the application this time on the ground that

1. A witness, Richard Best, was missing and that counsel had written to many members of the crew in an endeavor to locate witnesses, but without success;

2. That he would be unable to proceed to trial because of the mental condition of the plaintiff (p. 46). After hearing argument, Judge Coxe adjourned the case to May, 1943, and when it finally appeared on the calendar for December 1, 1943, it was marked off on consent.

On March 24, 1944, defendant moved to dismiss the action for lack of prosecution. This was opposed by plaintiff on the following grounds:

1. Inability to obtain witnesses;

2. Plaintiff's mental condition, and

3. Plaintiff's counsel did not know where plaintiff was; that he had not heard from him since June, 1943 (pp. 52-

55). This motion came on before Judge Hulbert who said (p. 56):

> "The opposing affidavit does not indicate reasonable diligence on the part of the plaintiff's attorney to discover the whereabouts of and communicate with his client. Motion will be denied without prejudice to renewal to enable him to do so."

Defendant made its second motion to dismiss this action for failure to prosecute on September 6, 1944. This time the plaintiff opposed the application on the grounds:

1. Plaintiff was confined to Miami Retreat Foundation as a mental case since May 5, 1943;

2. Impossible to obtain witnesses (pp. 67, 68). On October 20, 1944, after hearing extended argument on both sides, Judge Rifkind entered an order granting the motion:

> "Unless a committee is duly appointed for the plaintiff, Arthur Field, and is ready to proceed to trial within ninety (90) days from the date hereof" (p. 71).

On the ninetieth day after Judge Rifkind's order, to wit, January 18, 1945, the plaintiff moved to extend his time in which to comply with Judge Rifkind's order and defendant made a cross-section to dismiss the action. From the affidavit submitted by plaintiff's counsel in support of his application, it appears that he waited until January 11, 1945, before attempting to comply with Judge Rifkind's order. He states that on that date he made an application for appointment of a committee to Judge Hulbert, which was denied (p. 74). This application was not made on notice to defendant. On January 16, 1945, he petitioned the Supreme Court of the State of New York for the appointment of a committee, which was also rejected (p. 74).

Appendix
Excerpts from Briefs in Field v. American

Judge Coxe handed down a memorandum decision as follows (p. 85):

> "The plaintiff is already in default under the order of October 20th, 1944, and no adequate showing has been made for a further extension of time. I have, however, been at some pains to examine the entire file in the case, and believe that a dismissal for lack of prosecution, is amply justified. The motion is denied."

It is to be noted that Judge Coxe, in exercising his discretion to dismiss this action, states that he went to some pains to examine the entire file before arriving at his conclusion that a dismissal for lack of prosecution was amply justified. An order was duly entered on Judge Coxe's decision on February 2, 1945, and judgment duly entered on February 16, 1945.

Excerpts from Appellee's Brief
in Salmon vs City of Stuart, 194 F. 2d 1004 (5 Cir. 1952)

HISTORY OF CASE

The Complaint was filed on May 26, 1949 on behalf of Louise P. Salmon, on her own behalf and on behalf of the entire class of holders of bonds secured by St. Lucie Estates Collateral Trust against the City of Stuart and others.

This attorney of record in this case was Raymond R. Richardson of West Palm Beach, Florida. This record does not disclose that he was a member of any firm or associated in any manner with either Mr. Beacham or Mr. Gaulden as stated in the Appellants' brief.

On June 28, 1949 a Stipulation was entered into allow-

ing the filing of an amended complaint (page 19 of record). No definite time was set for filing this amended complaint.

No amended complaint was filed and on September 5, 1950, a Motion to Dismiss for lack of prosecution was filed (page 21 of record). This motion mentioned the Stipulation and stated that no proceedings had taken place since filing of Stipulation, a period extending over fourteen months.

Mr. Richardson remained the attorney of record since he did not resign until September 13, 1950. The record does not disclose that either Mr. Lane or Mr. Hamilton were interested in this case prior to the filing of the motion. Mr. Hamilton attended the hearing on the Motion to Dismiss and thereafter resigned of record on October 24, 1950 (page 23 of record).

The Court on October 11, 1950 entered an order dismissing said case (page 22 of transcript).

Mr. Dunscombe, the present attorney of record, was not present at the hearing nor did he appear of record until he filed a Petition to Vacate said Order of Dismissal which was filed December 4, 1950 (page 24 of record) which was almost sixty (60) days after entry of Order of Dismissal.

Later, on December 19, Mr. Dunscombe filed a Motion to Intervene (page 30 of record). These motions came on for hearing and on February 26, 1951 the Court denied the Motion to Reinstate the case (page 31 of record).

At the hearing on the Motion to Dismiss for Want of Prosecution in the course of the argument, the Court was advised that this present litigation had been in and out of the Courts of Florida since 1937, a period of over fourteen (14) years, a history of the litigation was recited, and a reference was made to certain state court litigation the outcome of which was in effect that the Appellant could not recover on the notes in question. Mention was made of a

similar suit filed before Judge Holland which finally resulted in a dismissal, it being a case brought by the Newport Culvert Co. against the City of Stuart.

At the hearing on the Motion to Dismiss a question was raised in the argument as to whether or not Mr. Richardson and Mr. Dunscombe had authority to bring this action. No question was raised regarding either Mr. Hamilton or Mr. Lane. However, the Court in its order made no reference to any question except the sole fact that the Plaintiff failed to prosecute her suit and this case was dismissed for want of prosecution.

From the order it appears that the lower court dismissed this suit solely because no action had been taken in the case for over a year and neither the record nor order show that any consideration was given by the lower court to the other arguments made at time the Motion to Dismiss for want of prosecution was made.

* * * * * * * * *

First Question

DOES THE FAILURE OF THE PLAINTIFF TO FILE A COMPLAINT IN AN ACTION OF OVER A YEAR JUSTIFY THE DISMISSAL OF THE SUIT FOR WANT OF PROSECUTION?

* * * * * * * * *

This suit was filed May 26, 1949 (page 1 of record) and on June 28, 1949, a Stipulation was filed whereby Plaintiff was allowed to file an Amended Complaint and after filing of same the Appellee was to be allowed 20 days to plead to said Complaint (page 19 of record). On September 5, 1950, a Motion to Dismiss was filed by Appellee for want

of prosecution (page 21 of record) and the Court granted said Motion on October 11, 1950 (page 22 of record).

The period wherein no action was taken by the Plaintiff was from June 28, 1949 to the date the case was dismissed, —over one year and three months. From the time the Motion to Dismiss was filed on September 5, 1950 until October 11, 1950, when the Order of Dismissal was entered the Plaintiff-Appellant herein made no effort to file an Amended Complaint or otherwise proceed with her suit. The Appellant never did file or tender any pleadings in said action until after the suit had been dismissed.

Rule 41-b contains ample authority for the dismissal of this case.

* * * * * * * * *

Excerpts from Printed Record on Appeal in Salmon vs City of Stuart, 194 F. 2d 1004 (5 Cir. 1952)

EXHIBIT NO. 7 (page 18 of Record)

Stuart, Florida, May 12, 1926.

$2000.00.

On or before five years after date, I, we or either of us promise to pay to the order of Southland Bond and Mortgage Company Two Thousand Dollars at the Stuart Bank & Trust Co., Stuart, Florida.

For value received, with interest after date at the rate of Eight per cent per annum, payable semi-annually, until paid.

The holder of this note being expressly authorized to retain any general or special deposit, collateral, real or

personal security or proceeds thereof, belonging to the undersigned, now or hereafter in the possession of said

(page 19 of the Record)

holder, during the time this note remains unpaid, and at before or after maturity to apply same to this or any other liabilities of the undersigned to the said holder, due or to become due.

Now, should it become necessary to collect this note through an attorney, either of us, whether maker, security or indorser on this note, hereby agree to pay all costs of such collections, including a reasonable attorney's fee. The drawers and indorsers severally waive presentment for payment, protest and notice of protest for non-payment of this note.

ST. LUCIE ESTATES, INC.,
CARROLL DUNSCOMBE, Pres.,
W. I. SHUMAN, Sec.

No. 5 Due May 12, 1931.

SOUTHLAND BOND & MORTGAGE CO.,
By W. I. SHUMAN, Pres.

On June 28, 1949 STIPULATION was filed in the words and figures as follows:

Whereas, the Plaintiff desires to file an amended complaint, and

Whereas, the City of Stuart, a municipal corporation, desires to enter its appearance in the above styled cause

(page 20 of the Record)

and to agree as to the time to plead to the amended complaint, it is,

Therefore Agreed and Stipulated by and between the Attorney for the Plaintiff, and the Attorneys for the Defendant, The City of Stuart, as follows:

1. That this stipulation shall be considered as a general appearance on behalf of the City of Stuart, a Florida municipal corporation in the above and foregoing cause.

2. That the Defendant, the City of Stuart, does not have to file any defensive pleadings to the complaint now on file in this cause and the plaintiff will seek no default or final judgment on the complaint now on file.

3. That the defendant be not required to file any defensive pleadings or motions in the above cause until 20 days after receipt of copy of an amended complaint from the attorney for the plaintiff.

4. That as stipulated hereinabove, after receipt of an amended complaint from the attorney for the plaintiff, the defendant, the City of Stuart, shall have 20 days thereafter in which to file a motion to dismiss, motion for better particulars, motion to strike or answer or such other defensive pleadings as the defendant, the City of Stuart, may be advised at that time.

(page 21 of the Record)

Dated this 24th day of June, A. D. 1949.

RAYMOND R. RICHARDSON,
Attorney for Plaintiff.
OUGHTERSON & DONLEY,
Attorneys for Defendant, City of Stuart,
a Florida Municipal Corporation.

Appendix

Excerpts from Record in Salmon vs. City of Stuart

On September 5, 1950 MOTION TO DISMISS was filed in the words and figures as follows:

Comes now the defendant, the City of Stuart, a Municipal Corporation, and represents unto this Court that the complaint was filed in the above styled cause on or about May 26, 1949, and that on or about June 28, 1949, a stipulation was entered into whereby the plaintiff was allowed to file an amended complaint and that after the filing of said amended complaint, the defendant, City of Stuart, a Municipal Corporation, would be allowed 20 days in which to plead to said amended complaint. This defendant further represents that the amended complaint has not been filed, and no further proceedings were taken in said case since June 28, 1949.

Wherefore, in view of the fact that this case has not been prosecuted for over a year, this defendant, the City of Stuart, a Municipal Corporation, moves that the said case be dismissed.

OUGHTERSON & DONLEY,
Attorneys for the City of Stuart.

Affidavit of Barry B. Wohlman

(Filed on March 20, 1959 in the Court of Appeals for the Third Circuit, as an Appendix to the Petition for Rehearing.)

Commonwealth of Pennsylvania)
County of Philadelphia) ss.

I, Barry B. Wohlman, being duly sworn, depose and say:
I am an attorney at law, in the offices of Leonard L.

Appendix

Affidavit of Barry B. Wohlman

Kalish, attorney for plaintiff-appellant in the above-identified case.

I examined the docket-entries in the office of the Clerk of the United States District Court for the Eastern District of Pennsylvania, for each of the 167 civil actions whose docket-numbers appear in the following Tabulations, and the dates in the first date-column of these Tabulations are the dates of dismissal under the 2-year Rule of that Court then in force and the dates in the second date-column of these Tabulations are the dates of the last previous action or step taken by any party prior to the Clerk's Notice under the 2-year Rule then in force, and that except for Civil Action 7795 (which is line 4 of the Tabulations) no response of any kind was made by either party to the Clerk's Notice under the 2-year Rule, and the response in Civil Action 7795 was the filing on January 15, 1951 of a Motion by plaintiff to vacate the dismissal and to reinstate the case, which Motion was withdrawn on January 25, 1951 without any other docket-entry to indicate that the withdrawal of such Motion was anything but voluntary.

/s/ BARRY B. WOHLMAN.

Sworn to and subscribed before me this 17th day of March, 1959.

/s/ ANNE C. McDONALD,
Notary Public,
Philadelphia, Philadelphia Co.

My commission expires March 10, 1961.

Appendix

Affidavit of Barry B. Wohlman

Tabulation

of the 52 cases dismissed under the District Court's 2-year Rule of 1939 during the two-year period ending December 1, 1952

and

of the 115 cases dismissed under the District Court's 2-year Rule of 1952 during the two-year period commencing December 1, 1952

Appendix

Tabulation of Dismissals Under 2-Year Rule of 1939

The 52 cases dismissed under the 2-year Rule of 1939, during the two years ending December 1, 1952.

	Docket number	date of Clerk's letter under the 2-year Rule	date of last previous step taken by any party	time interval between Clerk's letter and last previous action or step of parties: years	months	days
1-a)	5423	12-1-50	5-10-48	2	6	21
1-b)	5847	"	7-3-46	4	4	28
1-c)	6029	"	2-10-47	3	9	21
1-d)	6480	"	9-13-48	2	2	18
1-e)	6518	"	7-30-48	2	4	1
1-f)	6539	"	12-23-46	3	11	8
1-g)	6619	"	5-17-48	2	6	14
2)	8409	12-27-50	5-20-48	2	7	7
3)	6608	1-5-51	12-22-48	2		13
4)	7795	1-10-51	12-10-47	3	1	
5)	8705	2-20-51	2-8-49	2		12
6-a)	7390	3-15-51	12-5-47	3	3	10
6-b)	7413	"	1-21-48	3	1	24
6-c)	7418	"	1-5-49	2	2	10
6-d)	7445	"	4-4-48	2	10	24
6-e)	7456	"	8-6-47	3	7	9
6-f)	7458	"	8-18-47	3	6	27
6-g)	7471	"	6-20-47	3	8	25
7-a)	7507	4-20-51	1-23-48	3	2	27
7-b)	7510	"	8-7-47	3	8	13
7-c)	7517	"	12-22-47	3	3	28
7-d)	7550	"	9-8-47	3	7	12
7-e)	7564	"	9-3-47	3	7	17
7-f)	7624	"	9-19-47	3	7	1
7-g)	7629	"	9-15-47	3	7	5
7-h)	7649	"	8-20-47	3	8	
7-i)	7693	"	8-29-47	3	7	21
7-j)	7723	"	9-30-47	3	6	20

Appendix

Tabulation of Dismissals Under 2-Year Rule of 1939

The 52 cases dismissed under the 2-year Rule of 1939, during the two years ending December 1, 1952 (continued).

	Docket number	date of Clerk's letter under the 2-year Rule	date of last previous step taken by any party	time-interval between Clerk's letter and last previous action or step of parties		
				years	months	days
8)	7725	4-23-51	10-1-47	3	6	22
9)	9357	5-7-51	5-3-49	2		4
10-a)	6141	7-24-51	1-5-48	3	6	19
10-b)	6568	"	1-9-47	4	6	15
10-c)	6936	"	10-21-47	3	9	3
10-d)	7346	"	6-9-47	4	1	15
11)	4411	12-27-51	7-26-49	2	5	1
12-a)	5440	12-31-51	1-5-49	2	11	26
12-b)	6283	"	7-30-48	3	5	1
12-c)	6470	"	1-5-49	2	11	26
12-d)	6471	"	1-6-49	2	11	25
12-e)	6478	"	1-5-49	2	11	26
13-a)	6627	1-2-52	1-5-49	2	11	28
13-b)	6995	"	1-5-49	2	11	28
14)	9454	2-20-52	1-4-49	2	9	16
15-a)	6269	6-11-52	3-11-49	3	3	
15-b)	6326	"	6-27-49	2	11	14
15-c)	6328	"	9-2-48	3	9	9
15-d)	6992	"	5-31-49	3		11
15-e)	7001	"	3-22-47	5	2	19
16-a)	7032	7-2-52	12-23-48	3	6	9
16-b)	7548	"	5-1-50	2	2	1
16-c	7609	"	3-25-48	4	3	7
17)	10215	9-17-52	9-14-50	2		3

Appendix

Tabulation of Dismissals Under 2-Year Rule of 1952

The 115 cases dismissed under the 2-year Rule of 1952 during the two years commencing December 1, 1952.

NOTE: In respect to the 115 dismissals under the 2-year Rule of 1952, the dates in the first date-column are the dates upon which the Clerk entered on the Docket the dismissal of the action under the 2-year Rule (rather than the date of the Clerk's prior letter of "Notice" required by the Rule), because it was not the practice of the Clerk to make *any* docket-entry to show that the Notice required by the Rules had been sent to the parties 2 weeks (or more) before the dismissal under the Rule (nor was it the practice to keep in the file of the action a copy of such Notice);—the practice having been merely to enter the actual dismissal 2 weeks after the Notice unless either party asked that the case be not dismissed.

However, in the computation of the time-intervals between the Clerk's Notice and the last previous action or step taken by the parties or by the Court, 15 days was deducted from the time-interval between the respective dates in the two date-columns, on the assumption that the Clerk's letter of "Notice" preceded the dismissal by 15 days.

	Docket number	date of Clerk's letter under the 2-year Rule	date of last previous step taken by any party	time-interval between Clerk's letter and last previous action or step of parties		
				years	months	days
18-a)	7416	2-25-53	1-5-49	4	1	5
18-b)	7623	"	8-12-49	3	5	28
18-c)	7689	"	1-20-48	5		20
18-d)	7778	"	11-5-48	4	3	5
18-e)	7790	"	1-5-49	4	1	5
18-f)	7809	"	10-7-47	5	4	3
18-g)	7814	"	10-8-47	5	4	2
18-h)	7827	"	12-3-47	5	2	7
18-i)	7863	"	5-5-48	4	9	5

Appendix

Tabulation of Dismissals Under 2-Year Rule of 1952

The 115 cases dismissed under the 2-year Rule of 1952 during the two years commencing December 1, 1952 (continued).

	Docket number	date of Clerk's letter under the 2-year Rule	date of last previous step taken by any party	time-interval between Clerk's letter and last previous action or step of parties		
				years	months	days
18-j)	7872	"	10-31-47	5	3	16
19-a)	7121	2-26-53	5-10-49	3	9	1
19-b)	7889	"	11-2-49	3	3	9
19-c)	7890	"	1-5-49	4	1	6
19-d)	7969	"	11-28-47	5	2	13
19-e)	8016	"	12-17-47	5	1	24
19-f)	8017	"	12-17-47	5	1	24
19-g)	8030	"	12-31-47	5	1	11
19-h)	8039	"	1-19-48	5		22
19-i)	8046	"	2-18-48	4	11	23
19-j)	8049	"	6-29-48	4	7	12
19-k)	8094	"	2-17-48	4	11	24
19-l)	8099	"	2-25-48	4	11	16
19-m)	8105	"	1-19-48	5		22
20-a)	8123	4-8-53	1-26-48	5	1	27
20-b)	8029	"	1-27-48	5	1	26
20-c)	8087	"	2-1-49	4	1	22
20-d)	8235	"	3-2-48	5		21
21-a)	8316	4-10-53	7-22-48	4	8	3
21-b)	8336	"	5-27-48	4	9	28
21-c)	8387	"	5-6-48	4	10	19
21-d)	8430	"	5-18-48	4	10	7
22)	8711	4-13-53	8-17-48	4	7	11
23-a)	8256	4-14-53	11-3-48	4	4	26
23-b)	8367	"	9-14-48	4	6	15
23-c)	8569	"	4-5-49	3	11	24
23-d)	8582	"	9-24-48	4	6	5

Appendix

Tabulation of Dismissals Under 2-Year Rule of 1952

The 115 cases dismissed under the 2-year Rule of 1952 during the two years commencing December 1, 1952. (continued).

	Docket number	date of Clerk's letter under the 2-year Rule	date of last previous step taken by any party	time-interval between Clerk's letter and last previous action or step of parties: years	months	days
23-e)	8588	"	7-7-48	4	8	22
23-f)	8614	"	8-6-48	4	7	23
23-g)	8782	"	8-12-48	4	7	17
23-h)	8793	"	8-18-48	4	7	11
23-i)	8845	"	9-8-48	4	6	21
23-j)	8664	"	10-4-48	4	5	25
23-k)	8672	"	7-21-48	4	8	8
23-l)	8747	"	8-16-48	4	7	13
23-m)	8881	"	10-12-48	4	5	17
24)	9030	4-23-53	8-12-48	4	7	26
25-a)	8311	5-4-53	5-25-49	3	10	24
25-b)	8933	"	12-15-48	4	4	4
25-c)	8953	"	10-27-48	4	5	22
25-d)	8970	"	2-7-49	4	2	12
25-e)	9027	"	12-14-48	4	4	5
25-f)	9144	"	12-17-48	4	4	2
25-g)	9155	"	2-8-49	4	2	11
25-h)	9165	"	3-20-51	2		29
25-i)	9170	"	12-27-48	4	3	22
25-j)	9194	"	1-20-49	4	2	29
25-k)	9209	"	2-18-49	4	2	1
25-l)	9225	"	1-21-49	4	2	28
26-a)	8347	6-9-53	11-12-48	4	6	12
26-b)	9238	"	12-20-49	3	5	4
26-c)	9274	"	4-1-49	4	1	23
26-d)	9284	"	12-16-49	3	5	8
26-e)	9369	"	3-9-49	4	2	15
26-f)	9466	"	8-9-49	3	9	15

Appendix

Tabulation of Dismissals Under 2-Year Rule of 1952

The 115 cases dismissed under the 2-year Rule of 1952 during the two years commencing December 1, 1952 (continued).

	Docket number	date of Clerk's letter under the 2-year Rule	date of last previous step taken by any party	time-interval between Clerk's letter and last previous action or step of parties — years	months	days
26-g)	9468	"	4-18-49	4	1	6
26-h)	9472	"	6-29-48	3	10	25
26-i)	9476	"	10-2-50	2	7	22
26-j)	9480	"	1-26-51	2	3	28
26-k)	9510	"	12-6-49	3	5	18
26-l)	9528	"	4-12-49	4	1	12
27-a)	8799	6-10-53	9-13-48	4	8	12
27-b)	9546	"	4-21-49	4	1	4
27-c)	9549	"	12-1-49	3	5	24
28-a)	9279	9-1-53	2-25-49	4	5	21
28-b)	9690	"	11-28-49	3	8	18
28-c)	9697	"	10-24-49	3	9	22
28-d)	9721	"	6-30-49	4	1	16
28-e)	9772	"	7-26-49	4		20
28-f)	9806	"	10-31-50	2	9	16
28-g)	9871	"	11-30-49	3	8	16
28-h)	9912	"	7-29-49	4		17
28-i)	9913	"	8-30-49	3	11	16
28-j)	9970	"	9-23-49	3	10	23
28-k)	10015	"	9-30-49	3	10	16
28-l)	10069	"	10-5-49	3	10	11
28-m)	10111	"	1-11-50	3	7	5
28-n)	10119	"	12-12-49	3	8	4
28-o)	10164	"	11-9-49	3	9	7
28-p)	10177	"	1-12-50	3	6	29
28-q)	10191	"	11-2-49	3	9	4
28-r)	10226	"	5-7-51	2	3	9
28-s)	10239	"	7-17-50	3		29

Appendix

Tabulation of Dismissals Under 2-Year Rule of 1952

The 115 cases dismissed under the 2-year Rule of 1952 during the two years commencing December 1, 1952 (continued).

	Docket number	date of Clerk's letter under the 2-year Rule	date of last previous step taken by any party	time-interval between Clerk's letter and last previous action or step of parties		
				years	months	days
28-t)	10365	"	12-28-49	3	7	18
28-u)	10439	"	1-18-50	3	6	28
28-v)	10513	"	4-26-50	3	3	25
28-w)	10515	"	2-3-50	3	6	13
28-x)	10548	"	2-24-50	3	5	22
28-y)	10571	"	2-27-50	3	5	19
28-z)	10612	"	2-28-50	3	5	18
29-a)	10673	9-2-53	4-17-50	3	4	
29-b)	10690	"	4-3-50	3	4	14
29-c)	10706	"	5-21-51	2	2	26
29-d)	10716	"	4-3-50	3	4	14
29-e)	10818	"	5-12-50	3	3	5
29-f)	10947	"	7-27-50	3		20
29-g)	10994	"	7-10-50	3	1	7
29-h)	11011	"	4-18-51	2	3	29
29-i)	11201	"	8-11-50	3		6
29-j)	11633	"	6-22-51	2	1	25
29-k)	11677	"	2-2-51	2	6	9
30)	9300	5-18-54	9-29-49	4	7	4
31-a)	8848	6-14-54	2-1-50	4	3	28
31-b)	11316	"	10-4-50	3	7	25
32-a)	8486	9-20-54	6-7-48	6	2	28
32-b)	8487	"	6-7-48	6	2	28

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 18 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 225.

ORDNANCE GAUGE COMPANY, INC.,
Petitioner,

v.

JACQUARD KNITTING MACHINE CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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JOHN P. MASON,
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STATEMENT OF FACTS.

Petitioner instituted this action on May 3, 1951, while other litigation between the parties was pending,[1] and respondent's answer was duly filed on June 29, 1951. Thereafter, petitioner did not order the case onto the trial list and, in fact, took no steps whatever to progress this litigation or bring it on for trial for almost five and one-half years. Finally, in November of 1956, when the clerk of court, pursuant to local court rule (R. 32a footnote 4) issued notice of impending dismissal (R. 16a), petitioner filed with the court an application that the case not be dismissed "for lack of prosecution" and attempted to order the case onto the trial list (R. 17a).[2] Before argument on petitioner's application, respondent moved for dismissal under Fed. R. Civ. Proc. 41(b) (R. 18a). Respondent's motion was supported by affidavits showing how it had been prejudiced by petitioner's delay, through death of respondent's most important witness and loss of evidence (R. 19a, 20a, 21a, 30a).

Petitioner's application and respondent's motion under Rule 41(b) were heard together and Chief Judge Kirkpatrick granted respondent's motion, with prejudice (R. 22a). On re-hearing, after petitioner had for the first time offered an affidavit with which it attempted to excuse its delay (R. 23a-25a), Judge Kirkpatrick modified his previous action by ordering that the dismissal be without prejudice (R. 29a). This put plaintiff in the same position as if it had made no application and the clerk had marked the case dismissed under the local rule of court. The Court of Appeals, in an opinion written by Chief Judge Biggs (R. 31a-40a), affirmed the trial court's exercise of its discretionary power to dismiss, reasoning that, in view of

1. *Jacquard Knitting Machine Co., Inc. v. Ordnance Gauge Co., Inc. and Julius Sirmay*, 108 F. Supp. 59 (E. D. Pa. 1952), *aff'd.*, 213 F. 2d 503 (3d Cir. 1954).

2. Under the local practice a case is not placed upon the trial calendar until counsel issues a "trial order" (R. 36a).

the provisions of Rule 41(b), the dismissal without prejudice had been properly ordered. The contention that the Court of Appeals' decision was in conflict with this Court's opinion in *Societe Internationale v. Rogers*, 357 U. S. 197 (1958), was considered and disposed of, *per curiam*, on petition for re-hearing (R. 41a-43a), but is again urged here as the petitioner's principal reason for seeking grant of certiorari.

ARGUMENT.

The trial judge's orders (R. 22a, 29a) dismissing this action because of the petitioner's failure to prosecute has been affirmed on the authority of Federal Rule of Civil Procedure 41(b), which provides:

> "*For failure of the plaintiff to prosecute* or to comply with these rules or any order of court, *a defendant may move for dismissal of an action or of any claim against him* . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." (Emphasis added.)

Petitioner asks this Court to re-examine the dismissal, urging that Rule 41(b) does not furnish authority for dismissal under the circumstances of this case. In essence, it contends that the "failure to prosecute" comprehended by Rule 41(b) is only failure to appear and proceed when a case is called for trial. Since this case had never been called for trial, petitioner not having ordered it onto the trial list during the five and a half years it was at issue, petitioner concludes that dismissal under Rule 41(b) was improper (Petition, pp. 13, 18). Its supplemental argument is that if Rule 41(b) is applicable here it is violative of due process (Petition p. 20-23).

The issues raised by the petition are not such as warrant consideration by this Court in exercise of its certiorari jurisdiction (See Supreme Court Rule 19 (1)(b)). The decision below does not, in any way, conflict with applicable decisions of this Court or other courts of appeals. Rather, its approval of the District Court's dismissal because petitioner failed to prosecute is in accord

with long established practice and the decisions of this Court and the courts of appeals. Although the proper interpretation and application of the Federal Rules of Civil Procedure is an important matter, the questions raised by the petition for certiorari have long since been settled and do not call for a separate exercise of this Court's jurisdiction. Petitioner was granted a full and impartial hearing by the District Court. On the focal issue of whether the District Court abused its discretion in dismissing the action, the Court of Appeals correctly held that there was no basis for overturning the District Court's exercise of its discretionary power.

I. The Discretionary Power of Trial Courts to Dismiss Cases for Failure of the Plaintiff, at Any Stage, to Prosecute Its Action With Diligence Is Well Established.

Long before the advent of the Federal Rules of Civil Procedure, it was settled that courts have an inherent power, independent of any statute or court rule, to dismiss actions which the plaintiff neglects, at any stage, to prosecute with diligence: *3 Blackstone, Commentaries*, Chapter 20, *295-296 and Chapter 27, *451; *Homer v. Brown*, 16 How. 354, 365 (1853); *Johnston v. Standard Mining Co.*, 148 U. S. 360, 370 (1892); *Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F. 2d 825, 826 (10th Cir. 1948). As stated in *Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406, 409 (9th Cir. 1940):

> "'The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal.'"

No fixed rules can be formulated as to when it is appropriate that the power be exercised. This necessarily depends on the facts and circumstances of each case and the decision is left to the sound discretion of the trial judge. On appeal the only issue is whether or not that discretion has been abused. Thus, in *Facer Forged Steel Car Wheel & Locomotive Wheel Co. v. Carnegie Steel Co.*, 295 Fed. 134 (3d Cir. 1924), *cert. den.*, 265 U. S. 581 (1924), where the Circuit Court described the situation as follows (295 Fed. at 135):

> ". . . the plaintiff was at all times (during at least nine years) in position to bring the case to issue on five days' notice and have it set down for hearing. As the defendant did nothing to interfere with this right, it became the duty of the plaintiff to exercise it if it desired the redress it was seeking. In contemplation of law, it never ceased to be the actor. As it ceased to act it ceased to prosecute its suit . . ."

the Circuit Court concluded that, there being no abuse of discretion, the trial judge's dismissal for failure to prosecute should be affirmed even though "we might have come to a conclusion different from his" (295 Fed. at 135).

Here, on facts similar to those in *Facer*,[3] the District Court judge, who was uniquely familiar with all the facts,[4] after argument and reargument, exercised his discretion to dismiss. The Court of Appeals, after full argument and consideration of a petition for rehearing, affirmed. The careful study which this case has received in the courts below negatives any possibility that the discretion was

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3. Also see *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, 94 Fed. 312 (8th Cir. 1899).

4. Not only had Chief Judge Kirkpatrick heard the argument and reargument of the matter, but he had been the trial judge in the earlier proceedings between the same parties. (See *Jacquard Knitting Machine Co., Inc. v. Ordnance Gauge Co., Inc. and Julius Sirmay*, 108 F. Supp. 59 (E. D. Pa. 1952).

exercised arbitrarily or without the fullest consideration of all the relevant factors.

II. Rule 41(b) Is Declaratory of the District Courts' Long-Established Power to Dismiss at Any Stage.

That Rule 41(b) is merely declaratory of the long-established and inherent discretionary power of a district court to dismiss an action which plaintiff fails, at any stage, to prosecute with diligence (see *Boling v. United States*, 231 F. 2d 926, 927 (9th Cir. 1956) is clear not only from the words of the Rule but also from its history.

A preliminary draft of the Federal Rules of Civil Procedure made provision, in a rule then numbered 48, for dismissals without prejudice in various circumstances.[3] One subsection of this rule authorized dismissal, in the court's discretion, "when the plaintiff fails to appear on the trial" (proposed Rule 48(e)). A separate subsection provided for dismissal (proposed Rule 48(g)):

> "By the court in its discretion, when the plaintiff *failed to prosecute* the action with reasonable diligence, or has failed to comply with these rules or with any order of the court;" (Emphasis supplied.)

Thus, the draftsmen recognized "failure to prosecute" as embracing more than mere "failure to appear on the trial." Subsection (e) (failure to appear at trial) was later deleted, while subsection (g) (failure to prosecute) was in substance retained in the rule which was ultimately adopted as Rule 41. Obviously, the special provision concerning failure to appear at trial was deleted because such failure was necessarily comprehended within the broader provision of subsection (g) covering failure to prosecute at any stage.

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3. *Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia prepared by the Advisory Committee on Rules For Civil Procedure*, May, 1936, pp. 85-87.

That the failure to prosecute provisions of Rule 41(b) were intended to cover delay at any stage (not merely failure to appear at trial) is further demonstrated by the Advisory Committee's comments which immediately preceded adoption of the rules. With reference to Rule 3, the committee said:[6]

> "This rule provides that the first step in an action is the filing of the complaint. Under Rule 4, this is to be followed by issuance and service of process. No time limit is fixed for the issuance or service of process. *Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in taking further steps after it has been commenced.*" (Emphasis added.)

When dealing specifically with the problem of want of prosecution, no courts have interpreted Rule 41(b) in the manner suggested by petitioner. Instead they have held that plaintiff's inactivity is the only criterion for application of the Rule. Thus, in *Messenger v. United States*, 231 F. 2d 328 (2d Cir. 1956), which was dismissed under 41(b) because for four years plaintiff failed to mail a copy of the summons and complaint to the Attorney General,[7] the court referred to the fact that, "For some six years there has been a complete lack of any prosecutory effort" (231 F. 2d at 330). In *Salmon v. City of Stuart, Fla.*, 194 F. 2d 1004 (5th Cir. 1952), which was dismissed under Rule 41(b) when plaintiff failed to file an amended complaint, the court stated (194 F. 2d at 1004):

> ". . . it stands undisputed that, following the filing of this, the third suit, no action was taken in it by the plaintiffs for one year and three months.

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6. Notes of Advisory Committee on Rules, Rule 3, 28 U. S. C. (1952 ed.) p. 4292.

7. See also *Waterman v. Nelson*, 195 F. 2d 523 (2d Cir. 1952), *cert. den.*, 344 U. S. 843 (1952).

"Matters standing thus, the court was fully authorized to dismiss the action."

Against this background, petitioner cites the passing comment of this Court (and the District Court for the Southern District of New York[8]) that Rule 41(b) "appears in that part of the Rules concerned with *trials*" (*Societe Internationale v. Rogers*, 357 U. S. 197, 207 (1958)) as authority for petitioner's attempt to cripple a district court's power to remove deadwood from its dockets and to prevent law suits from hanging over the heads of defendants for long periods of time.[9]

The *Societe* case has nothing to do with the portion of Rule 41(b) dealing with failure to prosecute. In *Societe* an order was entered under Fed. R. Civ. Proc. 34 requiring plaintiff to produce a vast number of documents. Plaintiff produced over 190,000 documents, but was still unable to comply with the order. Accordingly, the District Court dismissed the complaint under Rule 37(b)(2)(iii), which deals with a "refusal to obey" an order entered under Rule 34. The Court of Appeals affirmed the dismissal on the basis of the District Court's inherent power and the portion of Rule 41(b) dealing with "failure of the plaintiff . . . to comply with . . . any order of court." This Court reversed, holding that a District Court's power to dismiss for noncompliance with a discovery order rests exclusively upon Rule 37, which deals specifically with refusal to make discovery. In declining to resort to Rule 41(b) this Court commented that that Rule "appears in that part of the Rules concerned with *trials* . . . and lacks . . . specific references to discovery" (375 U. S. at 207). Here, however, we are concerned with "failure to prosecute"—plaintiff's failure to take any steps to bring this case on for trial. This subject is dealt with, specifically and exclusively, in Rule 41(b). Clearly, this Court's pass-

8. *Russo v. Sofia Bros.*, 2 F. R. D. 80, 82 (S. D. N. Y. 1941) and *Adams v. Jarka Corp.*, 8 F. R. D. 571, 574 (S. D. N. Y. 1948).

9. See *Russell v. Cunningham*, 233 F. 2d 806, 810 (9th Cir. 1956).

ing comment to the effect that Rule 41(b) was irrelevant to a discovery question was not intended to suggest that the Rule is not applicable to a "failure to prosecute" such as is involved in this case.

As pointed out by the court below (R. 42a), there simply is no more logical and appropriate place for Rule 41(b) than in the chapter marked "Trials". In fact, that chapter contains several other rules which have much less to do with trials than does Rule 41(b). For example, Rule 41(a)(1)(i) provides for voluntary dismissal at any time before service of an answer and Rule 45(d) deals with the issuance of subpoenas for taking and the place of taking depositions. Since the provision concerning failure to prosecute applies to every stage of an action (including the failure to bring a case on for trial) the only alternatives to placing it in the "Trial" chapter would be to place the rule in every chapter or to make it a chapter by itself.

With regard to the Southern District of New York cases cited by petitioner, not one involved a dismissal under 41(b) for failure to prosecute. Instead each of those cases was dismissed pursuant to some other local or procedural rule and [illegible]ly question was whether, in subsequent proceedings [illegible]lismissal should be treated as having been "with [illegible] judice" through application of the concluding portion of Rule 41(b), where it is provided that "any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." *Russo v. Sofia Bros.*, 2 F. R. D. 80 (S. D. N. Y. 1941); *Adams v. Jarka Corp.*, 8 F. R. D. 571 (S. D. N. Y. 1948); and *United States v. Thomson*, 114 F. Supp. 874 (S. D. N. Y. 1953).

In fact, the District Court for the Southern District of New York has consistently followed the decisions of its appellate court in *Waterman v. Nelson*, 195 F. 2d 523 (2d Cir. 1952), *cert. den.*, 344 U. S. 843 (1952) and *Messenger*

v. United States, 231 F. 2d 328 (2d Cir. 1956), affirming dismissals, under the authority of Rule 41(b), at an early stage of the proceedings. Thus, in *Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc.*, 20 F. R. D. 375 (S. D. N. Y. 1957), which involved dismissal of an action where plaintiff failed to substitute new counsel and failed to take steps to bring the case on for trial, the District Court stated, 20 F. R. D. at 376:

> "The power of the Court to dismiss a case for lack of prosecution probably derives from the inherent power of a court to control its calendars. *Zielinski v. United States*, 2 Cir. 1941, 120 F. 2d 792. The power is also specifically granted in Rule 41(b) of the Federal Rules of Civil Procedure." [10]

III. There Is No Conflict Between the Due Process Clause and Rule 41(b) as It Was Applied in This Case.

Finally, there is no substance to petitioner's contention that Rule 41(b) and its application to this case are somehow violative of the due process of law requirement of the Fifth Amendment. Petitioner again cites passages from this Court's decision in *Societe* where it was recognized that Fifth Amendment problems may be raised by dismissal of an action "without affording a party the opportunity for a hearing on the merits" (357 U. S. at 209). But petitioner studiously ignores the fact that for over five years it was afforded ample opportunity to obtain a trial on the merits, through the simple expedient of filing a one-sentence trial order, and it failed to accept the opportunity. Petitioner further ignores the fact that it was given a full opportunity, in both the District and the Cir-

10. In *Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 21 F. R. D. 351 (S. D. N. Y. 1958), the same Judge of the same Court dismissed an action with similar facts. On appeal, the Court of Appeals reversed, 262 F. 2d 856 (2d Cir. 1959), not on the ground that the District Court lacked the power to dismiss under Rule 41(b) before the trial stage, but on the ground that under the circumstances of that case dismissal was not justified.

cuit Courts, to explain its inactivity and the dismissal was ordered only after its failure to produce any satisfactory explanation.

Careful research fails to disclose any case which so much as suggests that, under such circumstances, the discretionary power of dismissal is in any way inhibited by the due process clause. Cf. *Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F. 2d 825, 826 (10th Cir. 1948). In fact, this Court's decision in *Societe* looks the other way since it recognizes that, in the absence of good faith efforts to comply with the discovery order, the involved dismissal would have been appropriate (357 U. S. at 212, 213).

Since there is no conflict among the circuits and since the constitutional questions raised by petitioner are without substance, what petitioner really seeks is to have still a third court pass on the question of whether the discretionary power to dismiss was appropriately exercised on the facts of this case. That essentially factual question has already been carefully considered in both courts below and does not merit further consideration by this Court under its certiorari jurisdiction. Accordingly, respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

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